IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 236 OF 1991

1. Bhaskar Dharma Chikane, age 48 residing at Gulpoli, Taluka Barsi, District Solapur.

2. Sou. Mandakini Bhaskar Chikane age 43, residing at Gulpoli, Taluka Barsi, Dist: Solapur.
.. Appellants (Org.Defts.)

Vs.

Vaijinath Dashrath Chikane age 38, residing at Gulpoli, Taluka Barsi, Dist. Solapur.
.. Respondent (Org.Plaintiff)

Mr. K.Y. Mandlik for appellants.
Respondent though served, absent.

CORAM: B.H. MARLAPALLE, J.
Date : December 14, 2005.

ORAL JUDGMENT:

1. While admitting this appeal on 22/4/1991, the following substantial questions of law have been framed:-

(a) Whether suit for injunction simpliciter is maintainable?

(b) Whether decree is based on evidence on record?

(c) On whom lay the burden to prove exclusive title and exclusive user of suit entrance on plaintiff or on the defendants to prove common user of suit entrance?

2. The present respondent had filed Regular Civil Suit No.67 of 1980 for perpetual injunction against defendants-present appellants in respect of the suit property, namely, the half portion on eastern side of House No.87. As per the plaintiff he had purchased the said suit property from Devidas Dharma Chikane, the brother of Defendant No.1 (Present appellant no.1) by a registered Sale Deed dated 20/11/1978 and the suit property had come to the share of Devidas by way of partition between the two brothers. The plaintiff claimed that the defendants were using the main door of the suit property illegally and they had let the drain water in the suit property. He, therefore, sought permanent injunction against the defendants from using the entrance to House No.87 on the ground that they did not have such an easementary right or right of usage. The trial court vide its Judgment

dated 27/6/1986 decreed the suit partly and restrained the defendants perpetually from letting waste water from their house, through the eastern half portion of the plaintiff. However, the suit of the plaintiff in respect of the suit way i.e. common entrance was dismissed. The plaintiff, therefore, filed Regular Civil Appeal No.471 of 1986 which came to be allowed by the learned IV Additional District Judge at Solapur vide his Judgment and Order dated 29/1/1991. The defendants had taken out cross objections in the said appeal and the Lower Appellate Court was pleased to dismiss the same while allowing the appeal of the plaintiff.

3. The trial court held that the defendants proved that the half share of House No.87 was allotted to them and the Northern facing door of the said house was kept common along with common rights of usage. This finding has been reversed by the Lower Appellate Court.

4. In support of the plaintiff's case, three witnesses were examined, namely, P.W.1 Vaijinath Chikane, P.W.2 Janardan Chikane and P.W.3 Navnath

Chikane. Whereas the defendant no.1 examined himself as D.W.1. By way of documentary evidence the Sale Deed dated 20/11/1978 at Exh. 26, Court Commissioner's Report dated 29/1/1986 at Exh.22 and the sketch attached thereto and marked as Exh.22-A have been considered by the trial court.

5. An application at Exh.16 was moved by the plaintiff before the trial court for appointment of the Court Commissioner and his report at Exh.22 clearly indicated that when he visited House No.87 on 19/1/1986 he found only one common entrance marked by the Letters A,M. The sketch at Exh.22-A also shows only one entrance to House No.87 i.e. marked by Letters A,M. It was the case of the plaintiff that the way to the property of the defendants was from the area marked by Letters K,B and L and by putting up a new wall the same was closed and the defendants were using the entrance marked by Letters A, M. The Sale Deed at Exh.26 by which the plaintiff purchased the suit house from Devidas does not show whether the entrance marked by Letters A, M was an exclusive entrance of the suit property and it is an admitted position that before the partition between the two

brothers, House No.87 had only one entrance i.e. marked by Letters A,M towards the Northern side facing the public road. If the plaintiff claimed that the said entrance was under his exclusive usage and the defendants did not have any right to use the same for their ingress and egress, it was necessary for him to establish that either in the Sale Deed at Exh.26 the said right was crystalised or by way of partition between the two brothers, the respective shares were provided with an independent entrance. The onus fell on the plaintiff to prove that the suit way was under his exclusive usage and the defendants were provided with a separate entrance to their property i.e. half share on the western side of House No.87. To prove this, it was necessary for the plaintiff to examine an official of the Village Panchayat and examining P.W.2 and P.W.3 would not support the case of the plaintiff. The trial court rightly considered the oral and documentary evidence and recorded a finding that the plaintiff and the defendants had a joint right of usage to the entrance at A, M (common entrance) and the defendants could not allowed to let the drain water flow from their portion to the suit house of the plaintiff. The Lower Appellate Court misdirected

itself by shifting the onus on the defendants to prove that they had a right of common entrance. It was not the case of the defendants that they had the exclusive rights on the entrance at A,M. In addition, it is clear from the sketch at Exh.22-A that apart from the entrance at A, M, there is no other entrance to House No.87 and by the impugned decree passed by the Lower Appellate Court the defendants have been left out without an entrance. There is no clear evidence which could be believed that in the portion marked by Letters K,B and L in the sketch at Exh.22-A there was an entrance to the property of the defendants provided when the partition between the brothers had taken place and, therefore, the defendants did not have the right of joint usage of the main door at A,M. In the absence of the documentary evidence from the records of the Village Panchayat, the testimony of P.W.2 and P.W.3 cannot be accepted, more so when they have been shown to be interested witnesses in their cross-examination. The depositions made by them regarding the defendants having an independent entrance to their property cannot be accepted unless corroborated by the village record and it was the responsibility of the plaintiff to do so. Such an

evidence was not available before the Lower Appellate Court so as to reverse the decree passed by the trial court. It is also noted that no additional evidence by way of public documents was placed before the Lower Appellate Court by the plaintiff when the appeal was decided.

6. Hence, this appeal succeeds and it is held that the entrance that is marked by Letters A,M to House No.87 is a common entrance and not the exclusive entrance of the plaintiff. The decree passed by the Trial Court in RCS No.67 of 1980 is hereby confirmed, whereas the impugned decree passed by the Lower Appellate Court is hereby set aside. No costs.

(B.H. Marlapalle,J.)